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In the Supreme Court of the United States

OCTOBER TERM, 1985

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COMMODITY FUTURES TRADING COMMISSION,  
PETITIONER

v.

WILLIAM T. SCHOR, ET AL.

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CONTICOMMODITY SERVICES, INC., PETITIONER

v.

WILLIAM T. SCHOR, ET AL.

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*ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT*

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**REPLY BRIEF FOR THE  
COMMODITY FUTURES TRADING COMMISSION**

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21PA

## TABLE OF AUTHORITIES

	Page
Cases:	
<i>Alonso v. Commissioner</i> , 78 T.C. 577 .....	8
<i>Aptheker v. Secretary of State</i> , 378 U.S. 500 .....	3
<i>Board of Governors of the Federal         Reserve System v. Dimension         Financial Corp.</i> , No. 84-1274 (Jan. 22, 1986) .....	3
<i>Boyton v. Commissioner</i> , 74 T.C. 989 .....	9
<i>Erie Railroad Co. v. Tompkins</i> , 304 U.S. 64 .....	12
<i>Estate of Baldwin v. Commissioner</i> , 59 T.C. 654 .....	8
<i>Estate of Crawford v. Commissioner</i> , 46 T.C. 262 .....	8
<i>Estate of Draper v. Commissioner</i> , 64 T.C. 23 .....	8
<i>Estate of Lazar v. Commissioner</i> , 58 T.C. 543 .....	8
<i>Estate of Miller v. Commissioner</i> , 58 T.C. 699 .....	8
<i>Estate of Rubinow v. Commissioner</i> , 75 T.C. 486 .....	9
<i>Estate of Swenson v. Commissioner</i> , 65 T.C. 243 .....	9
<i>Estate of Williams v. Commissioner</i> , 62 T.C. 400 .....	8

## Cases—Continued:

<i>Ford Motor Co. v. Department of Treasury</i> , 323 U.S. 459 .....	6
<i>Garcia v. San Antonio Metropolitan Transit Authority</i> , No. 82-1913 (Feb. 19, 1985) .....	15
<i>Glidden Co. v. Zdanok</i> , 370 U.S. 530 .....	11
<i>Hand v. Paine Webber Jackson &amp; Curtis, Inc.</i> , [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,739 (Sept. 30, 1985) .....	15
<i>Hodel v. Virginia Surface Mining &amp; Reclamation Ass'n</i> , 452 U.S. 264 .....	14
<i>Hoffman v. Commissioner</i> , 54 T.C. 1607 .....	9
<i>Indianapolis v. Chase National Bank</i> , 314 U.S. 63 .....	12
<i>Lewis v. Commissioner</i> , 33 T.C. 215 .....	8
<i>Misasi v. Paine, Webber, Jackson &amp; Curtis, Inc.</i> , [1980-1982 Transfer Binder] Comm. Fut. L. Rep. ¶ 21,351 (Dec. 30, 1981) .....	16
<i>National Mutual Insurance Co. v. Tidewater Transfer Co.</i> , 337 U.S. 582 .....	12
<i>Northern Pipeline Construction Co. v. Marathon Pipe Line Co.</i> , 458 U.S. 50 .....	10, 11, 14

## Cases—Continued:

<i>Plunk v. Shearson/American Express, Inc.</i> , [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,489 (Jan. 25, 1985), aff'd mem., No. 84-R29 (CFTC Aug. 29, 1985) .....	15
<i>Reconstruction Finance Corp. v. Bankers Trust Co.</i> , 318 U.S. 163 .....	13
<i>Schor v. Conticommodity Services, Inc.</i> , cert. denied, No. 85-872 (Jan. 21, 1986) .....	4
<i>Schor v. Conticommodity Services, Inc.</i> , cert. denied, No. 84-1673 (June 17, 1985) .....	4
<i>Scott v. Commissioner</i> , 70 T.C. 71 .....	8
<i>Sherwood v. Madda Trading Co.</i> , [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,728 (Jan. 5, 1979) .....	15
<i>Southland Corp. v. Keating</i> , 465 U.S. 1 .....	6, 9, 13
<i>Thomas v. Union Carbide Agricultural Products Co.</i> , No. 84-497 (July 1, 1985) .....	6, 10, 16
<i>United Mine Workers v. Gibbs</i> , 383 U.S. 715 .....	13
<i>United States v. Sullivan</i> , 332 U.S. 689 .....	3
<i>United States v. Will</i> , 449 U.S. 200 .....	10
<i>Yu Cong Eng v. Trinidad</i> , 271 U.S. 500 .....	3

## Constitution, statute and regulation:

## U.S. Const.:

Art. I .....	5, 7, 8, 14, 15
Art. III .....	<i>passim</i>

## Internal Revenue Code (26 U.S.C.):

§ 1 (& Supp. II) .....	8
§ 71(a) (Supp. II) .....	8
§ 2031 .....	8
§ 2033 .....	8
§ 2053 (& Supp. II) .....	8
§ 2056 (& Supp. II) .....	8
§ 6901 .....	8
§ 7441 .....	8
17 C.F.R. 12.24 (1983) .....	

## Miscellaneous:

Krattenmaker, <i>Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional</i> , 70 Geo. L.J. 297 (1981) .....	10-11
Friendly, <i>The Historic Basis of Diversity Jurisdiction</i> , 41 Harv. L. Rev. 483 (1928) .....	12

**In the Supreme Court of the United States****OCTOBER TERM, 1985****No. 85-621****COMMODITY FUTURES TRADING COMMISSION,  
PETITIONER**

v.

**WILLIAM T. SCHOR, ET AL.****No. 85-642****CONTICOMMODITY SERVICES, INC., PETITIONER**

v.

**WILLIAM T. SCHOR, ET AL.****ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT****REPLY BRIEF FOR THE  
COMMODITY FUTURES TRADING COMMISSION**

In our opening brief, we demonstrated that the Commodity Futures Trading Commission (CFTC) is authorized to adjudicate, subject to judicial review, state law counter-claims and that such adjudication, especially with the consent of the parties, does not violate Article III. Respondents offer no effective rebuttal to our position. Their constitutional argument, that the Commission's resolution of such counterclaims somehow offends a protected sphere of state sovereignty, abandons the rationale of the court of appeals,

(I)

is contrary to familiar and longstanding practice, and finds no support in the Constitution or in this Court's Article III jurisprudence.

1. Respondents argue first (Br. 6-16) that the Commodity Exchange Act (CEA) does not permit the Commission to entertain a broker's debit balance counterclaim that arises out of the same transaction as a customer's complaint for reparations under the Act. Respondents apparently would require that Congress expressly authorize such jurisdiction. No precedential support is cited for this unusual proposition, nor do respondents point to any legislative history suggesting that any Member of Congress took the position that the agency could not adjudicate such counterclaims and thereby fully resolve the dispute over the transaction.<sup>1</sup> Even if a clear indication of congressional intent is required, the legislative history of the CEA, which is discussed in our opening brief (at 19-21), indisputably demonstrates that Congress recognized and approved of the Commission's authority to adjudicate counterclaims.<sup>2</sup>

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<sup>1</sup>Respondents rely heavily on what they view as the unprecedented nature of the Commission's counterclaim jurisdiction. They fail to respond to our brief, however, where we pointed out (at 46 n.23) that agencies commonly resolve state law issues in the course of awarding reparations and restitution. In any event, regardless of the frequency of such adjudication by other agencies, Congress delegated to the CFTC the authority to fashion its own reparations program in the manner that the agency determines will best further its purposes. Respondents' observation (Br. 8) that the reparations forum was not intended "to resolv[e] all possible disputes between customers and registrants" or to serve as a collection service for brokers is beside the point: the Commission's counterclaim jurisdiction is carefully limited to debit balance claims arising out of the same transaction as a customer's own claim, and brokers may not invoke the Commission's jurisdiction in the absence of claims by their customers.

<sup>2</sup>Respondents discount this legislative history by suggesting (Br. 7, 9) that Congress, in acknowledging the Commission's jurisdiction over counterclaims, was referring only to those arising under the CEA. As we made clear in our opening brief (at 23), however, such counterclaims

Moreover, respondents' argument ignores the plain language of the statute, through which Congress conferred an exceedingly broad grant of rulemaking authority upon the CFTC. See Gov't Br. 18-19. There is nothing in the language of the Act to support the implied limitation on this delegation for which respondents contend. Compare *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 12. Nor, of course, is the Act subject to judicial amendment to avoid confronting constitutional questions. See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964); *United States v. Sullivan*, 332 U.S. 689, 693 (1948); *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926). The Commission, in exercising its legislatively delegated authority, has determined that administrative adjudication of counterclaims will best further the purposes of the Act. Respondents, without even a nod to the deference owed the agency's construction of its own statute, advance no persuasive reason for overcoming that deference in this case.

Respondents suggest, contrary to the Commission's experience, that jurisdiction over counterclaims is unimportant and will not further the purposes of the reparations program. Their contention (Br. 13) that only 60 cases involved counterclaims from 1980 to 1984 is manifestly erroneous. This figure referred only to cases still pending in 1984; it did not reflect the numerous cases that had been disposed of during that four-year period. Although published information is not available, we stand by our earlier representation (Br. 25) that debit balances arise routinely in

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almost never arise. Respondents do not directly dispute this. Rather, they rely (Br. 9 n.5) only on a proposed rule circulated for notice and comment before the Commission had any experience with the reparations program and on a Commission order issued in response to the decision below, which merely implements the precise holding of the court of appeals.

CFTC reparations proceedings and that counterclaims are filed in a significant portion of these cases. And as we have also made clear (Br. 26-27), invalidation of the Commission's counterclaim rule would seriously impair the usefulness of the reparations forum by deterring customers from bringing their actions before the agency, regardless of the actual number of cases in which formal counterclaims might eventually be raised.<sup>3</sup>

Respondents' argument (Br. 14-15) that the Commission's adjudication of counterclaims will disadvantage customers rests on their unsupported contention that the CFTC does not permit customers to raise state law defenses or counterclaims of their own, a contention that they have already twice unsuccessfully pressed in this Court. See *Schor v. ContiCommodity Services, Inc.*, cert. denied, No. 85-872 (Jan. 21, 1986); *Schor v. ContiCommodity Services, Inc.*, cert. denied, No. 84-1673 (June 17, 1985). As we explained in our responses to those cross-petitions, respondents' state law claims were not presented to the Commission; the Commission's regulations do permit a customer to raise state law defenses to a broker's counterclaims (see 17 C.F.R. 12.24 (1983)); and the Commission has never taken a position on whether a customer may assert his own state law counterclaims to a broker's counterclaim because that issue has never arisen in the history of the reparations program. There is accordingly no basis for respondents' argument that customers are discouraged from taking advantage of the reparations forum for fear

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<sup>3</sup> Respondents' argument (Br. 14) that the Commission's counterclaim jurisdiction is unimportant because brokers may still file their debit balance claims in court ignores the fact that the efficiency and lower cost of the reparations forum make it attractive to brokers as well as to customers. In this very case, Conti voluntarily dismissed its federal court action in order to proceed before the Commission. See Gov't Br. 5-6.

that they will not be able to rely on state law where it would be appropriate to do so—an argument contradicted by the fact that many thousands of customer-initiated claims have already been adjudicated by the Commission (see Gov't Br. 24).

2. a. Respondents attempt to answer our argument that they consented to the Commission's adjudication of Conti's counterclaim merely by pointing (Br. 40-41) to their opposition to that adjudication before the reparations forum. They wholly fail to respond to our demonstration (Br. 5, 28-29; see J.A. 11-14, 17-20), however, that respondents affirmatively stated in the district court where Conti's debit balance claim was pending that they wished to see the entire dispute, including that claim, resolved before the Commission. It was not until after the ALJ issued his preliminary decision against respondents that they argued, for the first time, that the counterclaim could not be resolved in the reparations forum. Having succeeded in obtaining Conti's dismissal of its debit balance action following their representation that it would be adjudicated before the CFTC, respondents plainly are in no position to argue that they did not consent to the agency's decisionmaking authority. And, in any event, respondents' voluntary choice to file their claim before the Commission (rather than in court) with knowledge that the counterclaim would then be adjudicated in the same forum amply demonstrates their consent to that adjudication.<sup>4</sup>

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<sup>4</sup>The doctrine of unconstitutional conditions, on which respondents rely (Br. 40-41 n.31), is irrelevant to this case. Respondents have not been denied a government benefit because they exercised a constitutional right. Rather, they had the option of seeking resolution of their controversy with Conti in an Article III forum or in the reparations forum. As we explained in our opening brief (at 29-32), nothing in the Constitution in general or Article III in particular requires that this choice be totally costless. Such a requirement would effectively render

b. Respondents also argue (Br. 38-40) that Article III prohibits the CFTC's adjudication of Conti's counterclaim even with their consent.<sup>5</sup> If accepted, this far-reaching proposition could invalidate on constitutional grounds numerous federal statutes and well-established adjudicatory procedures, such as the Federal Arbitration Act, the Magistrates Act, and reference to special masters and referees, which authorize non-Article III decisionmakers to resolve questions of state law. See Gov't Br. 33-37. Respondents attempt to brush these areas aside with the cursory observation (Br. 40) that "resort to these sorts of alternatives is [not] necessarily inconsistent with the expectations underlying the grant of federal power." But if parties may consent to the entry of orders enforceable in federal court in these contexts, it is scarcely possible to see why they should not be able to do so here as well.<sup>6</sup> In every case, Congress has

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all constitutional rights nonwaivable. Just last Term, of course, the Court upheld a considerably more burdensome consent to adjudication by a non-Article III tribunal. *Thomas v. Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), slip op. 22.

<sup>5</sup>In making this argument, respondents rely in large part on the doctrine that defects in subject matter jurisdiction are not waivable. We explained in our opening brief (at 38 n.19) why that rule is irrelevant here, and we cited precedents of this Court holding that Congress may condition the jurisdiction of federal courts on the consent of the parties. See also *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, 467 (1945) (jurisdiction depended on state's consent; absence of jurisdiction could be raised for first time in this Court). Respondents offer no reply to our discussion.

<sup>6</sup>This is particularly so with respect to the Federal Arbitration Act, which overrides state laws that formerly made contractual arbitration clauses unenforceable. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). If Congress may, on the basis of the consent of the parties, take general commercial disputes out of the state courts even though the states themselves had specified that they could only be resolved there, it surely may give litigants the option of proceeding in the reparations forum for the narrow range of claims at issue here, which the states have not historically confined to their own courts (and which may in fact be brought in federal court).

sanctioned the resolution of both federal and state law questions by decisionmakers who lack the protections of Article III, and it has made that resolution legally binding on the parties following a measure of judicial review.

Respondents offer no reason why decisions by the Commission in its reparations forum somehow derogate from state prerogatives in any greater degree than decisions by magistrates, arbitrators, or special masters. Indeed, the more searching judicial review of Commission decisions, the limitation of the Commission's jurisdiction to counterclaims arising out of the same set of facts as reparations claims, and the general lack of relevance of questions of state law to the Commission's decisions on counterclaims all suggest precisely the opposite. The constitutionality of the Commission's consensual reparations forum therefore follows directly from the constitutionality of these other dispute resolution mechanisms.

Finally, respondents assert (Br. 38) that our reliance on consent rests on the notion that Article III creates only personal rights. We plainly acknowledged in our opening brief (at 37-40), however, that Article III also responds to structural concerns, and we were careful to demonstrate why those concerns are not impaired by the Commission's adjudication of state law counterclaims with the consent of the parties.

3. The bulk of respondents' brief (at 16-38) is devoted to the remarkable proposition that Article III prevents Congress from establishing, under Article I, a tribunal that adjudicates any state-created cause of action, no matter how intimately related to federal rights.

a. Respondents' formalistic proposed distinction between an Article I tribunal's adjudication of a state-created cause of action and such a tribunal's determination of issues of state law (and thus of state-created rights) in the course of

adjudicating federally-created causes ignores the wide-ranging issues of state law involved in the latter types of determinations and their importance to the parties. For example, the Tax Court is an Article I court (I.R.C. § 7441). The Tax Court is routinely required to decide questions of state law, and to determine the rights of parties under state law, in reviewing the Commissioner's assertion of deficiencies in federal income, estate, and gift tax. State law, for example, may determine whether an individual is subject to transferee liability (I.R.C. § 6901), whether a decedent has an interest in property subject to estate tax (I.R.C. §§ 2031, 2033), whether a payment is includable in income as alimony (I.R.C. § 71(a) (Supp. II)), whether claims and expenses qualify for deduction against the gross estate (I.R.C. § 2053 (& Supp. II)), whether a bequest to a surviving spouse qualifies for the estate-tax marital deduction (I.R.C. § 2056 (& Supp. II)), and whether persons are single or married for purposes of income-tax filing requirements (I.R.C. § 1 (& Supp. II)). Thus, the Tax Court must regularly decide whether the transfer of property, or the creation of an interest in property, is a fraudulent conveyance under state law;<sup>7</sup> must determine individuals' rights under wills, partnership agreements, and insurance policies;<sup>8</sup> must decide whether a party under state law has enforceable rights against an estate, or whether fees paid by an executor are allowable expenses of administering the estate;<sup>9</sup> must

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<sup>7</sup>E.g., *Alonso v. Commissioner*, 78 T.C. 577, 582-583 (1982); *Scott v. Commissioner*, 70 T.C. 71, 79-84 (1978); *Lewis v. Commissioner*, 33 T.C. 215, 220-223 (1959).

<sup>8</sup>E.g., *Estate of Draper v. Commissioner*, 64 T.C. 23, 29-32 (1975); *Estate of Williams v. Commissioner*, 62 T.C. 400, 407-413 (1974); *Estate of Miller v. Commissioner*, 58 T.C. 699, 707-714 (1972); *Estate of Crawford v. Commissioner*, 46 T.C. 262, 269-271 (1966); *Estate of Hull v. Commissioner*, 38 T.C. 512, 521-522 (1962).

<sup>9</sup>E.g., *Estate of Baldwin v. Commissioner*, 59 T.C. 654, 657-659 (1973); *Estate of Lazar v. Commissioner*, 58 T.C. 543, 552-555 (1972).

determine whether a former spouse under state law has a legal obligation to pay alimony;<sup>10</sup> must determine the nature of an allowance paid under state law to a surviving spouse, or the effect of a beneficiary's disclaimer on the disposition of property under a will;<sup>11</sup> and must even decide whether state law would recognize a particular divorce as valid.<sup>12</sup> Even apart from the possible collateral estoppel effects of such determinations, they obviously affect substantial rights of the parties to the federal proceedings. It has, however, generally been regarded as properly respectful of state authority (rather than a denigration of that authority) for federal tribunals to do their best to conform their decisions to applicable rules of state substantive law.

In any event, respondents' contention that a different rule should apply to adjudication of state-created causes of action is directly contradictory to, and thus squarely foreclosed by, this Court's decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984). The question in that case was whether the federal Arbitration Act required a dispute between the parties to a franchise agreement to be submitted to arbitration pursuant to the agreement's arbitration clause. The underlying dispute between the parties clearly involved state-created causes of action, asserted in state court by the appellee franchisees, for alleged "fraud, oral misrepresentation, breach of contract, breach of fiduciary duty, and violation of the disclosure requirements of the California Franchise Investment Law" by the appellant franchisor. 465 U.S. at 4. This Court held that the federal Act required the claims to be submitted to arbitration and

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<sup>10</sup>E.g., *Hoffman v. Commissioner*, 54 T.C. 1607, 1611-1613 (1970).

<sup>11</sup>E.g., *Estate of Rubinow v. Commissioner*, 75 T.C. 486, 488-492 (1980); *Estate of Swenson v. Commissioner*, 65 T.C. 243, 249-253 (1975).

<sup>12</sup>E.g., *Boyter v. Commissioner*, 74 T.C. 989, 994-1000 (1980).

pre-empted a state statutory provision construed by the state Supreme Court as preventing their arbitration and retaining them for adjudication in the state courts. This Court thus squarely held in *Southland* that Congress could, and did, require the adjudication of state-created causes of action by a non-Article III tribunal.

Indeed, essentially the same constitutional argument respondents here advance was made by the appellee franchisees in *Southland* in a portion of their brief in this Court (at 33-38) entitled "The Federal Arbitration Act Would Be Unconstitutional If Applied To Bar State Courts from Adjudicating Important State Rights for which Access to a Judicial Forum Is Guaranteed by the State Legislature." While the argument was made in a slightly different context and was articulated somewhat differently, it relied on Article III of the Constitution and this Court's then-recent decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), for basically the same constitutional theory respondents now urge. This Court's holding in *Southland*, therefore, necessarily rejected that constitutional claim.

As we shall now briefly show, this Court's rejection of that claim in *Southland* fully comports with the important role and purposes of Article III.

b. The tenure and salary provisions of Article III were intended to safeguard the role of the federal judiciary as an independent and co-equal branch of the federal government. See, e.g., *Thomas v. Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), slip op. 13; *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. at 57-60 (plurality opinion); *United States v. Will*, 449 U.S. 200, 217-218 (1980); Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts*

*are Unconstitutional*, 70 Geo. L.J. 297, 304 (1981) (emphasis in original) (Article III protections concern "the separation of powers at the *federal* level"). In the court of appeals' view (now virtually abandoned by respondents), the CFTC's adjudication of counterclaims is constitutionally suspect because it threatens this independence. See 85-621 Pet. App. 33a. We demonstrated in our opening brief why this view is erroneous.

*Northern Pipeline*, on which respondents place primary reliance (Br. 27), is wholly irrelevant to what is now respondents' principal contention. In almost 70 pages of opinions in that case there is not a single reference to state prerogatives.<sup>13</sup> Instead, the plurality based its decision on the very threat to judicial independence that respondents virtually concede (Br. 34) is not present here. See, e.g., 458 U.S. at 57-60, 64 & n.15, 68, 74, 83-84. And the Justices who concurred in the judgment reasoned that the Bankruptcy Act deprived litigants of their personal, waivable right to adjudication before an Article III judge, not that the Act impaired the powers of the States. See *id.* at 90-91. Respondents cite no case suggesting — contrary to the holding in *Southland*—that only those federal tribunals constituted under Article III may adjudicate state law claims under any circumstances.<sup>14</sup>

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<sup>13</sup>Indeed, while the plurality noted a number of institutional values served by Article III in addition to the separation of powers at the federal level, it did not list the furtherance of state interests among them. 458 U.S. at 59 n.10.

<sup>14</sup>Most of the cases on which respondents rely are plainly inapposite, for they rest on the undisputed—and irrelevant—proposition that the jurisdiction of Article III courts is limited to the cases and controversies set forth in Section 2 of that provision. The plurality in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), expressly disclaimed (*id.* at 549) any decision concerning "the extent to which Congress may \* \* \* [assign adjudicatory tasks] to tribunals other than Article III courts." Rather, the parties and the plurality assumed (*id.* at 537 (footnote omitted)) that

The absence of judicial authority for respondents' position is hardly surprising given its corresponding lack of historical support. Respondents make much (Br. 18-22) of the controversy engendered by the Diversity Clause in the debates over ratification of the Constitution. None of the reasons advanced against the Clause, however, is relevant to the Commission's counterclaim rule. As Judge Friendly explained in *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 488-491 (1928), the Anti-Federalists gave five grounds for abolishing diversity jurisdiction: federal jurisdiction would be exclusive and therefore would deprive state courts of jurisdiction; state courts would somehow be absorbed into the federal government; federal law might be applied in favor of state law; litigation in the federal courts would be unduly expensive; and the state courts were adequate to meet the needs of the new nation. The first of these propositions is erroneous as a matter of law and the second as a matter of fact; the third was settled by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); the fourth cuts in favor of the less expensive administrative tribunal; and the last is contrary to the judgment of Congress and the Commission in establishing and implementing the reparations forum.<sup>15</sup>

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a question of state law presented for decision "solely by reason of the diverse citizenship of the litigants" must be decided in conformity with Article III. That proposition, however, is quite beside the point here, where the state law issue is presented not because of the parties' citizenship but because of its intimate relation to a federally created cause of action. Other cases on which respondents rely, such as *Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941), similarly are limited to situations in which diversity of citizenship is the only basis for federal adjudication. See also *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 650 (1949) (Frankfurter, J., dissenting) (federal diversity jurisdiction "has no relation to any substantive rights created by Congress").

<sup>15</sup>To the extent that respondents rely on the impartiality and expertise of federal judges, those concerns are effectively dispelled by the

c. Even if Article III were thought to place limitations on federal adjudication of state causes of action unrelated to federal rights (but see *Southland Corp. v. Keating, supra*), those limitations would be wholly irrelevant here. The Commission adjudicates only those debit balance counter-claims that arise out of the same transaction or occurrence as a customer's reparations claim. As such, these would be within a federal court's ancillary or pendent jurisdiction. See Gov't Br. 42; *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (constitutional authority to adjudicate a state law claim exists whenever that claim "derive[s] from a common nucleus of operative fact" with a federal claim). Just as federal courts may adjudicate state law issues in conjunction with federal claims in the absence of diversity, so may administrative agencies. See *Reconstruction Finance Corp. v. Bankers Trust Co.*, 318 U.S. 163, 168-171 (1943) (upholding administrative resolution of state law claim ancillary to federal dispute).

Respondents contest the relevance of ancillary jurisdiction only by asserting (Br. 29-30 n.24) that such jurisdiction advances the purposes of Article III when exercised by courts but impedes them when exercised by administrative tribunals. The encroachment, as respondents would have it, on state prerogatives is the same in either case: a federal tribunal is adjudicating state law issues in circumstances outside the limited grant of federal diversity jurisdiction. And, as we have explained (Br. 24-27), the exercise of ancillary jurisdiction in this context furthers the purposes behind establishment of the tribunal just as it does for courts. There is surely no basis in Article III for depriving administrative tribunals of this limited, but necessary, supplement to their adjudicatory authority.

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consensual nature of the Commission's authority. See Gov't Br. 28-41. Respondents have not explained how such consensual adjudication could possibly impair the interests of the States.

In addition to misapprehending the scope and purpose of Article III, respondents ignore Congress's powers under Article I. While Article III provides the authority for judicial determination of state law causes of action in the limited circumstances permitted by the Diversity Clause and doctrines of ancillary and pendent jurisdiction, it is also true that, in Article I, the States authorized the federal government to exercise plenary authority over areas such as interstate commerce. See generally, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-277 (1981). Article III may limit the manner in which that authority is exercised in order to safeguard the rights of individuals and the role of the federal judiciary as a co-equal branch of the federal government. See *Northern Pipeline*, 458 U.S. at 57-60, 73-76 (plurality opinion). Respondents completely fail, however, to offer support for the proposition that Article III extends further to alter the federal-state balance established by Article I. In particular, respondents have failed to advance any reason for erecting a constitutional barrier against Congress's delegation of authority to the Commission to adjudicate counterclaims as an incident to Congress's power to establish a forum for adjudicating the right to reparations that it enacted. See *id.* at 83-84 (plurality opinion).

d. Even if Article III were thought to impose some limitation upon the exercise of Congress's Article I powers for the purpose of preserving sovereign prerogatives of the States, the CFTC's adjudication of debit balance counterclaims remains constitutionally unobjectionable. Agency adherence to state law cannot itself constitute an affront to state sovereignty. To the contrary, it demonstrates respect for that sovereignty. And the States themselves, of course, are not parties to the Commission's reparations proceedings. This case therefore raises no question concerning any possible governmental immunity that they might possess from

suit in or orders entered by an Article I tribunal. Compare *Garcia v. San Antonio Metropolitan Transit Authority*, No. 82-1913 (Feb. 19, 1985).

Moreover, as we explained in our opening brief (at 47-48), the Commission has not historically been required to adjudicate contested issues of state law. Rather, the agency's decision on a broker's counterclaim typically follows inexorably from its decision on the customer's federal law claim for reparations, and in particular, from its conclusion whether the broker committed a violation of the CEA that caused the customer's debit balance.<sup>16</sup> Accordingly, there is no ground for supposing that the Commission will misinterpret or misapply state law (and even if issues of state law did routinely arise in reparations proceedings, they would of course be reviewable *de novo* in federal court).

We also pointed out in our opening brief (at 47) that the Commission could preempt state contract laws governing debit balances, and that any affront to the dignity of the States that might somehow accompany adjudication of debit balance counterclaims surely would be less than that entailed by such preemption. Ignoring the Commission's own authority to preempt state law, respondents reply only by noting (Br. 36) that Congress itself must act in conformity with the Presentment Clause. That much of course is true, but it fails to blunt the force of our argument. Our point is simply that it would be anomalous to read Article III to protect state rights in a manner that would require the Commission to displace state law rather than to apply it faithfully.

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<sup>16</sup>See, e.g., *Hand v. Paine Webber Jackson & Curtis, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,739, at 31,099 (Sept. 30, 1985); *Plunk v. Shearson/American Express, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,489, at 30,157 (Jan. 25, 1985), aff'd mem., No. 84-R29 (CFTC Aug. 29, 1985); *Sherwood v. Madda Trading Co.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,728, at 23,020 n.19 (Jan. 5, 1979).

Finally, if respondents' concern is that the availability of the reparations forum will significantly impair the viability of the state courts, that fear is grossly overstated. Paying "practical attention to substance rather than [placing] doctrinaire reliance on formal categories" (*Thomas*, slip op. 17), it must be clear beyond any reasonable doubt that the Commission's consensual adjudication of this narrow range of counterclaims—which could be brought in federal court in any event—cannot possibly threaten to undermine state judicial systems. The state forum remains available (see *Misasi v. Paine, Webber, Jackson & Curtis, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. ¶ 21,351 (Dec. 30, 1981)), but even where it is used, the state court, like the Commission, must subordinate questions of state law to the requirements of the federal CEA. There is simply no possibility that the parties' option of going to the reparations forum for resolution of the extremely circumscribed class of claims raised in the context of the federally regulated commodities industry will jeopardize the core function of state courts, which is, of course, to develop, interpret, and apply state law.

For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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